KERETAPI TANAH MELAYU BHD v. MOHAN VYTHIALINGAM & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AZIZAH NAWAWI JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NOS: W-01(A)-664-11-2019
& W-01(A)-684-11-2019]
20 MARCH 2023

Abstract – *The act of an employer taking away an acting position from an employee can be considered a demotion if it is not bona fide and results in a significant decrease in the employee's responsibilities, pay or status. If this demotion is found to be a significant breach of the employment contract, it could be considered a constructive dismissal. However, if the change in position is only temporary, properly communicated to the employee and with the understanding that the employee would return to his original position, it may not be considered a constructive dismissal.*

CONTRACT: *Employment contract – Breach – Employee assigned and re-assigned to acting positions before being informed by employer to return to original designation – Whether employer's conduct in breach of fundamental term of employee's contract of employment – Whether re-assignment required valid justification – Whether within employer's prerogative to transfer, assign and re-assign employee*

LABOUR LAW: *Dismissal – Constructive dismissal – Employee assigned and re-assigned to acting positions before being informed by employer to return to original designation – Whether acting position permanent – Whether there was demotion – Whether there was constructive dismissal*

WORDS AND PHRASES: *'acting' – Employment – Employee assigned and re-assigned to acting positions before being informed by employer to return to original designation – Whether 'acting role' means temporary position and assignment*

The claimant served with Keretapi Tanah Melayu Bhd ('KTMB') as a locomotive driver. The claimant was then assigned to an acting position, as an Acting Industrial Relations Executive ('AIRE'), and later, re-assigned as an Acting Executive, Rules and Regulations ('AERR'). The claimant was unhappy and sought an explanation for the re-assignment. KTMB responded by explaining that the claimant's acting position was only temporary and when the period ends, he was supposed to return to his original position as a locomotive driver but KTMB had, instead, re-assigned him as an AERR.

The claimant accepted KTMB's explanation and reported for work as the AERR. Ten months later, KTMB informed the claimant that he would be transferred back to his original designation. The claimant again sought an explanation from KTMB and the latter explained that it was within its prerogative and discretion to transfer the former to his original post. This time, the claimant refused to accept KTMB's explanation and the transfer, which he deemed as a demotion. The claimant proceeded to tender his resignation. The claimant then filed a representation with the Industrial Relations Department and his representation was referred to the Industrial Court. At the conclusion of the trial, the Industrial Court found that the claimant had been constructively dismissed without just cause or excuse and awarded him back wages and compensation *in lieu* of reinstatement, in the amount of RM95,152. At the High Court: (i) KTMB filed an application to quash the award; while (ii) the claimant applied to review the quantum of the award. The High Court Judge ('HCJ') dismissed KTMB's application and affirmed the claimant's award. Hence, the present appeals by both KTMB and the claimant. The issues that arose for adjudication were, *inter alia*, (i) whether KTMB's conduct had breached a fundamental term of the claimant's contract of employment; and (ii) whether the reassignment required a valid justification.

Held (allowing KTMB's appeal, dismissing claimant's appeal and quashing award of Industrial Court)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) The employment contract that bound KTMB and the claimant was the employment contract which offered the claimant the position of a locomotive driver. There was no other contract of employment executed by KTMB and the claimant. When the claimant was offered the acting positions, it was never communicated nor agreed that there would be any changes to the original employment contract. The word 'acting' is clear and simple; it means to hold a temporary position temporarily. The word 'acting' is typically considered to be a temporary assignment. It was evident that the 'acting' role was meant to be temporary and not permanent, unless the person is made permanent later. There was no express or implied promise made by KTMB that the two acting positions offered to the claimant would become permanent. There was also no evidence that the claimant was misled or had misunderstood the meaning of 'acting'. Furthermore, the claimant never mentioned having any expectation of being offered a permanent position in the executive positions, in any of his correspondences with KTMB or in his testimony in court. In fact, when the claimant assumed the role of AERR, from his position as AIRE, he had accepted KTMB's explanation that he could have been re-assigned to his original position as a locomotive driver but was instead given another acting position. Therefore, KTMB's

instruction for the claimant to return to his original role did not violate the terms and conditions of his employment as he was originally hired as a locomotive driver. There was no breach of a fundamental term that would constitute a constructive dismissal. (paras 40-41, 43-45 & 50)

(2) The Industrial Court opined that KTMB could only re-assign the claimant back to his original confirmed designation as locomotive driver with just cause and reason. This finding was affirmed by the HCJ. The HCJ had erred in completely disregarding the fundamental feature of the position; at the end of the day, it was only a temporary position. Requiring KTMB to provide a reason or justification acceptable to the court for re-assigning the positions would essentially transform the temporary acting position into a permanent one. This could not be justified either in fact or in law. To do so constituted an unwarranted interference in KTMB's management rights to re-assign its employees to temporary positions, as long as the employee is appropriately compensated through allowances or other means. (paras 52-54 & 57)

Case(s) referred to:

A Girish Kumar Gopalakrishnan v. Kilang Kelapa Sawit Sri Lingga Sdn Bhd & Anor [2010] 2 LNS 1371 ***(refd)***

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***

Baladevan Nadarajan v. PPG Performance Coatings (M) Sdn Bhd [2019] 3 ILR 28 ***(refd)***

Bennett Subash Peter v. Bon Ton Sdn Bhd (Bon Ton Resort Langkawi) [2019] 4 CLJ 150 CA ***(refd)***

Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 10 CLJ 266 HC ***(refd)***

Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd [1997] 3 CLJ 827 CA ***(refd)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:

Employment Act 1955, s. 13(2)

Industrial Relations Act 1967, s. 20(3)

(Civil Appeal No: WA-01(A)-664-11-2019)

For the appellant - Andrew Teh & Tan Chong Pei; M/s Wong Lu Peen & Tunku Alina

For the respondents - V Rajadevan; M/s Rajadevan & Assocs

(Civil Appeal No: W-01(A)-684-11-2019)

For the appellant - V Rajadevan; M/s Rajadevan & Assocs

For the respondents - Andrew Teh & Tan Chong Pei; M/s Wong Lu Peen & Tunku Alina

[Editor's note: Appeal from High Court; Judicial Review No: WA-25-182-04-2019 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] There are two appeals before this court against the decision of the
B learned High Court Judge dated 7 November 2019. Appeal No: WA-01(A)-664-11-2019 ("Appeal 664") is the appellant/Keretapi Tanah Melayu Berhad's ("KTMB") appeal against the decision of the judge in dismissing KTMB's application to quash the award of the Industrial Court, No. 465/2019 dated 31 January 2019. The Industrial Court had allowed the claim by
C the first respondent for constructive dismissal and awarding the sum of RM95,152, comprising of 24 months of back wages and 1 1/3 month wages *in lieu* of reinstatement.

[2] Appeal No: WA-01(A)-684-11-2019 ("Appeal 684") is En Mohan a/l Vythialingam's ("claimant") appeal on the quantum of compensation that
D was allowed by the Industrial Court which was affirmed by the High Court.

[3] These appeals emanated from two judicial review applications which were consolidated and heard together. Judicial Review Application No: WA-25-182-04-2019 was filed by KTMB, *inter alia*, for an order of *certiorari*
E to quash the decision of the Industrial Court in deciding that the claimant was constructively dismissed and was awarded back wages and compensation *n lieu* of reinstatement (Appeal 664). The other Judicial Review Application No: WA-25-177-04-2019, was filed by the claimant in respect of the quantum of compensation awarded by the Industrial Court, in Appeal 684.

F **[4]** Having considered the appeal records and the submissions of the parties, this court has allowed KTMB's appeal and quashed the Industrial Court Award No: 465/2019 with no order as to costs.

The Salient Facts

G **[5]** KTMB is the main rail operator in Semenanjung Malaysia, whilst the claimant was a former employee of KTMB.

[6] The claimant started working with KTMB on 1 September 1983 as a Pembantu Lokomotif Rendah. In 1992, the claimant was promoted to Pemandu Lokomotif Rendah Kanan.

H **[7]** On 21 September 1994, the claimant was confirmed as a locomotive driver with a monthly salary of RM1,042.80.

[8] In November 2014, KTMB advertised in its website a vacancy for the position of Manager, Industrial Relations Department. Eight candidates applied for that job, including the claimant, who had since obtained a Master
I in Business Administration from University Kebangsaan Malaysia.

[9] The claimant was unsuccessful in his application after being interviewed for the position. Another candidate, Azhari bin Hashim, was offered the position and was subsequently employed as the Manager of the Industrial Relations Department.

[10] On 24 December 2014, the claimant was assigned an acting position, as an Acting Industrial Relations Executive (Grade N03G05), for a fixed period of six months, from 26 December 2014 to 25 June 2015, receiving an acting allowance of RM532.78 per month, on top of his existing salary as a locomotive driver.

[11] After the end of the six months period, KTMB reassigned the claimant as Acting Executive, Rules and Regulations (Grade N05AG07) with effect from 30 July 2015, and an acting allowance of RM518 per month was paid to the claimant, on top of his existing salary as a locomotive driver.

[12] Based on two collective agreements signed between KTMB and the unions, when an employee of KTMB is offered an acting position, the employee will be paid an "acting allowance", calculated based on the grade of the acting position.

[13] The claimant was unhappy with the reassignment from Acting Industrial Relations Executive, to Acting Executive, Rules and Regulations, and wrote a letter dated 10 August 2015 to KTMB, seeking an explanation on the re-assignment.

[14] KTMB responded by explaining that the claimant's acting position was only temporary and when the period ended, the claimant was supposed to return to his original position as a locomotive driver. Instead, KTMB reassigned him as the Acting Executive, Rules and Regulations Unit.

[15] The claimant accepted KTMB's explanation as he did not challenge the said decision and he reported for work at the Operations Department as Acting Executive, Rules and Regulations on 28 August 2015.

[16] About ten months later, through a letter dated 26 May 2016, KTMB informed the claimant that effective from 1 June 2016, the claimant will be transferred back to the Sentul Depot as EMU Driver (Grade A07G10), that is the claimant's original designation. The only impact of this transfer is that the claimant's acting allowance would cease.

[17] The claimant was unhappy with the transfer back to his original position and wrote a letter dated 6 June 2016, seeking an explanation from KTMB.

[18] In its letter dated 9 June 2016, KTMB explained that the position of Acting Executive, Rules and Regulations was just temporary and it was KTMB's prerogative and discretion to make any staff transfer, including the claimant's transfer to his original post.

[19] The claimant refused to accept KTMB's explanation and the transfer, which he deemed as a demotion, and tendered his resignation through a letter dated 13 June 2016. In his resignation letter, the claimant also stated that he reserved his right to plead a case of constructive dismissal against KTMB.

[20] KTMB responded in a letter dated 15 June 2016, informing the claimant that any resignation made by the claimant must comply with art. 26 of the seventh collective agreement between KTMB and the Union, whereby the claimant must provide one month notice or one month salary *in lieu* of one month notice to KTMB.

[21] KTMB did not receive any response from the claimant.

[22] Subsequently, KTMB issued a letter dated 16 June 2016 to the claimant, stating that the claimant's employment with KTMB had been terminated on 13 June 2016 pursuant to s. 13(2) of the Employment Act 1955, unless the claimant can provide a reasonable explanation within seven days from the date of the letter about the claimant's failure to report for work since 13 June 2016.

[23] The claimant did not return to work nor responded to KTMB's letters.

[24] The claimant then filed a representation with the Industrial Relations Department and his representation was referred to the Industrial Court for determination pursuant to s. 20(3) of the Industrial Relations Act 1967 ("IRA 1967").

[25] After a full trial, the Industrial Court made a finding that the claimant was constructively dismissed without just cause or excuse and awarded him the following back wages and compensation *in lieu* of reinstatement:

(i) Back wages of 24 months: RM3,756 (inclusive of acting allowance at job scale M05AG07) x 24 months = RM90,144

(ii) Compensation *in lieu* of reinstatement: RM3,756 x 1 1/3 month = RM5,008

Total **RM95,152**

[26] Arising from the award, KTMB has filed an application to quash the award, whilst the claimant had applied to review the quantum awarded by the Industrial Court.

Decision Of The Industrial Court

[27] The Industrial Court decided that the claimant was entitled to assert constructive dismissal when KTMB issued him a transfer order from his temporary role as an Acting Executive, Rules and Regulations Unit back to his original role as a locomotive driver, as his performance was not disputed or brought into question during his acting assignment, and he had not faced any disciplinary actions.

[28] The Industrial Court held that KTMB's decision to transfer the claimant to his original post as a locomotive driver was in breach of the fundamental term of the contract of employment which went to the root of the contract and that KTMB had evinced an intention not to be bound by the contract, resulting in his constructive dismissal.

Decision Of The High Court

[29] The learned High Court Judge had affirmed the award. The learned judge held that the transfer from an Acting Executive, Rules and Regulations Unit to a non-executive post with lesser functions and responsibilities, without the acting allowance, amounted to a demotion for the claimant. The learned judge also ruled that any unilateral alteration in employment conditions that results in a decrease in earnings and a change in job duties constitutes a fundamental violation of the contract.

Submission Of Parties

[30] Before this court, KTMB submitted that the claimant's position as an Executive in the Rules and Regulations Unit was only temporary and his permanent position was that of a locomotive driver. Therefore, returning to his permanent position did not violate the terms or conditions of his employment agreement. That being the case, the claimant's complaint does not fulfil the legal elements of a case for constructive dismissal, nor a breach of the employment contract by KTMB.

[31] Before this court, KTMB also submitted that the Industrial Court made a mistake in requiring KTMB to provide a reason for transferring or re-assigning the claimant in order to determine if the reassignment was justified. This is because the claimant's role as an executive was only temporary.

[32] With regard to the quantum of damages *in lieu* of reinstatement, KTMB submitted that the decision of the Industrial Court in awarding 1 1/3 month wages is correct based on the period the claimant was appointed as the Executive, Rules and Regulations Unit and not for the entire duration of his employment with KTMB.

[33] The claimant took the position that his transfer from an executive post to his original post as a locomotive driver, which is a non-executive post, was a demotion and a clear case of constructive dismissal.

[34] The claimant also submitted that the compensation *in lieu* of reinstatement must be based on the multiplicand of one month's salary for every completed service with KTMB, which is a period of 33 years. As such, it was submitted that the calculation based on 1 1/3 month is wrong in law.

Our Decision

[35] The test to be applied for a claimant in the Industrial Court to prove constructive dismissal has been set out by the Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 at pp. 301 to 302:

> The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used. It must be observed that para (c) never used the words "constructive dismissal". This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought, and a few decisions were made, that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavation* (*supra*) reiterating an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd* [1969] 3 All ER 1126) rejected this test of unreasonableness ...
>
> Thus, it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relation. Such proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expression with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.
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> ...
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> When the Industrial Court is dealing with a reference under s. 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concepts to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para (c) of s. 55(2) of the UK Protection of Employment Act 1978. Therefore, we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word "dismissal" in our s. 20. We think that the

word "dismissal" in this section should be interpreted with reference to the common law principle. *Thus, it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed.* (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd.* [1970] Lloyd's LR 486). (emphasis added)

[36] Further, in determining the issue of constructive dismissal, the contract test is applicable rather than the test of reasonableness. In *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197, this court had reaffirmed the contract test in constructive dismissal case and stated as follows:

It has been repeatedly held by our courts that *the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract.'* (emphasis added)

[37] As for the burden of proof of constructive dismissal, the High Court in *Govindasamy Munusamy v. Industrial Court Malaysia & Ano*r [2007] 10 CLJ 266 stated as follows:

[5] To succeed in a case of constructive dismissal, *it is sufficient for the claimant to establish that:*

(i) the company has by its conduct breached the contract of employment in respect of one or more of the essential terms of the contract;

(ii) the breach is a fundamental one going to the root or foundation of the contract;

(iii) the claimant had placed the company on sufficient notice period giving time for the company to remedy the defect;

(iv) if the company, despite being given sufficient notice period, does not remedy the defect then the claimant is entitled to terminate the contract by reason of the company's conduct and the conduct is sufficiently serious to entitle the claimant to leave at once; and

(v) the claimant, in order to assert his right to treat himself as discharged, left soon after the breach.

[6] *The test for constructive dismissal as it stands is a test on contractual breach rather than unreasonableness. Further, where the workman's claim for reinstatement is based on constructive and not actual dismissal, the onus of proving that he has been constructively dismissed lies on the workmen himself.* (emphasis added)

[38] Based on the aforesaid principles, in order to establish a case of constructive dismissal, the claimant must prove the following:

(i) that KTMB's conduct had breached a fundamental term of the contract of employment or that KTMB had evinced the intention not to be bound by the said contract;

(ii) that the said breach had undermined the entire foundation of the contract;

(iii) that the claimant gave KTMB sufficient notice of the breach and giving them time to rectify the same;

(iv) that if KTMB did not rectify the breach upon notice, the claimant was justified in terminating the contract immediately; and

(v) that the claimant quit soon after the breach occurred.

[39] In the present appeal, the claimant claimed constructive dismissal when he had to resign from his employment with KTMB due to KTMB's conduct, which was to reassign him back to his original position. The claimant claimed that this amount to a breach of an express or implied term of his contract of employment. The claimant claimed that his transfer from an executive post to the locomotive driver position amount to a demotion and is a breach of his contract of employment, hence it constitutes constructive dismissal.

Whether KTMB's Conduct Had Breached A Fundamental Term Of The Claimant's Contract Of Employment

[40] In the present appeal, the employment contract that binds KTMB and the claimant is the employment contract dated 14 September 1994, which offers the position of a Grade A7G10 locomotive driver to the claimant. By accepting the offer, the claimant agreed to abide by the terms and conditions for non-executive staff employed by KTMB. There is no other contract of employment executed by KTMB and the claimant, apart from the locomotive driver contract.

[41] It is important to note that the claimant was then offered an acting position twice, with the latest one being that of Acting Executive in Rules and Regulations. However, it was never communicated nor agreed that there would be any changes made to the original employment contract dated 14 September 1994, which designated the claimant as a locomotive driver of Grade A7G10 and obligated him to comply with the terms and conditions for non-executive employees of the company.

[42] We are of the considered opinion and we agree with learned counsel for KTMB that the meaning of the word "acting" is clear and simple, which is to hold a temporary position temporarily. The word "acting" is typically considered to be a temporary assignment. According to the *Cambridge English*

Dictionary, the word "acting" refers to a person temporarily performing a job in place of the regular person. Thus, it is evident that the "acting" role is meant to be temporary and not permanent, unless the person is made permanent later.

[43] In this appeal, there was no express or implied promise made by KTMB that the two acting positions offered to the claimant would become permanent. There was also no evidence presented by the claimant that he was misled or had misunderstood the meaning of the term "acting." In fact, Article 2.0 of Arahan Pengurusan Bakat dan Pembangunan Organisasi provides the definition of acting or pemangkuan, as follows:

> 2.0 Tafsiran
>
> 2.1 "Pemangkuan" ertinya pekerja yang telah diarahkan oleh syarikat untuk memangku sesuatu jawatan dalam gred yang lebih tinggi secara sementara dalam masa ketiadaan penyandang hakiki.

[44] It is also to be noted that the claimant never mentioned having any expectation of being offered a permanent position in the executive positions in any of his correspondence with KTMB or in his testimony in court.

[45] In fact, when the claimant assumed the role of Acting Executive, Rules and Regulations, from his earlier position as Acting Industrial Relations Executive, he had accepted KTMB's explanation that he could have been reassigned to his original position as a locomotive driver but was instead given another acting position. Thus, the claimant had no expectation that the position as an acting executive would be a permanent position.

[46] Added to that, the Industrial Court also made a finding that the temporary assignment from Acting Industrial Relations Executive to Acting Executive, Rules and Regulations was accepted by the claimant:

> [52] That being the case, it is the finding of the Court that the Claimant has agreed to accept the job scale N05AG07 which is lower than N03G05; which otherwise the Claimant would have voluntarily reported himself back to the position as Senior Locomotive Driver A07G10.

[47] Moreover, during the trial, it was never suggested to KTMB's witnesses that a staff who was offered an acting position would subsequently be guaranteed the said position permanently either. The Industrial Court's finding on this is in para. [64] of the award:

> [64] The fact that *during the trial, it was never suggested to the Company's witness that a staff who was offered an acting position would subsequently be guaranteed the position permanently or neither in all the correspondence by the Claimant to the Company nor in his testimonies in Court did he say that he had an expectation of being offered a permanent position* must not be viewed as enclothing the Company with liberty to revert the Claimant to his old position as a Locomotive Driver as and when the Company feels expedient to do so especially when no specific term fixed to this post, unlike that of the first transfer which was fixed for six (6) months. (emphasis added)

[48] It is also not uncommon for KTMB to offer acting positions to its employees, and this practice is even supported by the provisions of the collective agreement regarding acting positions. Article 57 of the seventh collective agreement between KTMB and the Officers' Union provides the 'elaun memangku' for employees placed in acting position:

> **Elaun Memangku**
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> 57.1 Eksekutif yang diarah oleh Syarikat untuk memangku sesuatu jawatan dalam gred yang lebih tinggi secara sementara dalam masa ketiadaan penyandang haikiki akan dibayar elaun memangku dengan syarat-syarat berikut …

[49] The claimant himself acknowledged that as a locomotive driver, he was subject to the collective agreement between the company and the Union, and when he was given acting positions, he received additional "acting allowances" on top of his salary as a locomotive driver. In his witness statement, the claimant's evidence (CLWS1), Q&A 8 reads as follows:

> Q: Do you agree that your terms of employment as driver and the Collective Agreement (CA) entered into between the Company and the Railwaymen's Union does not entitle you to extra or additional privileges as a university degree holder?
>
> A: Yes.

[50] Therefore, we are of the considered opinion that KTMB's instruction for the claimant to return to his original role as a locomotive driver did not violate the terms and conditions of his employment, as he was originally hired as a locomotive driver. The "acting" positions were only temporary and not a permanent change in his employment status.

[51] The burden of proof is on the claimant to demonstrate that KTMB had breached a fundamental term of the employment contract that is essential to the agreement, or had shown an intention of not being bound by it. We find that the binding employment contract between the claimant and KTMB is for the position of locomotive driver. There was no evidence given by the claimant to show that a new contract was created. The acting positions were given on a temporary basis and were never intended to be permanent. The temporary positions were clearly communicated to the claimant and the claimant had acknowledged the same when he accepted the first reassignment from Acting Industrial Relations Executive to Acting Executive, Rules and Regulations. As held in para. [52] of the award, if the claimant had rejected the second reassignment, he would have reported himself back to the position as Senior Locomotive Driver A07G10. Therefore, we find that KTMB did not breach a fundamental term of the claimant's contract of employment or that KTMB had evinced the intention not to be bound by the said contract.

Whether The Reassignment Requires A Valid Justification

[52] However in the award, the Industrial Court took the position that KTMB can only reassign the claimant back to his original confirmed designation as locomotive driver with just cause and reason. Paragraph [59] of the award reads as follows:

> [59] Therefore, the Court is of the considered opinion that since the Claimant's performance was never disputed or raised as an issue during the `Acting' attachment period and the Claimant free from disciplinary actions, he was perfectly entitled to claim constructive dismissal when the Company issued the Claimant a transfer order from the post of Acting Executive back to his old position as a Locomotive Driver.

[53] The above finding was affirmed by the learned High Court Judge, who agreed with the Industrial Court's findings that KTMB could only transfer the claimant to his previously approved position as a locomotive driver if there was a valid reason. The learned judge then concluded that KTMB did not have any valid justification for reassigning the claimant to his prior role as a locomotive driver.

[54] We are of the considered opinion and we agree with learned counsel for KTMB that the learned High Court Judge had erred in completely disregarding the fundamental feature of the position, that at the end of the day, it was only a temporary position. Requiring KTMB to provide a reason or justification acceptable to the court for reassigning the positions would essentially transform the temporary acting position into a permanent one. This cannot be justified either in fact or in law.

[55] In fact, the learned judge had completely ignored the evidence of KTMB's witness, En Zulkifli Ismail, who gave evidence that the reassigning of the claimant's position as a locomotive driver is because his job as the Acting Executive, Rules and Regulations is no longer required. Paragraph [54] of the award reads:

> [54] Now it is pertinent to refer to the Company witness En. Zulkifli Ismail's Witness Statement (COWS-1, Q&A 8) when he testified that 'Selepas itu, pihak syarikat berpendapat bahawa jawatan yang dipegang oleh En. Mohan iaitu Acting Executive, Rules & Regulations di Jabatan Operasi tidak diperlukan lagi dan membuat keputusan untuk menukar beliau balik ke jawatan asal sebagai pemandu lokomotif.

[56] There is nothing sinister in KTMB's reason that since the claimant's job as the Acting Executive, Rules and Regulations is no longer required, he was reassigned back to his original position.

[57] Therefore we are of the considered opinion that the learned judge's finding that KTMB can only terminate the acting designation with justification has no legal basis. To do so constitutes an unwarranted

interference in KTMB's management rights to reassign its employees to temporary positions, as long as the employee is appropriately compensated through allowances or other means.

Whether The Claimant's Reassignment Was Due To The Union Complaints

[58] During his oral submission before this court, learned counsel for the claimant submitted that because of the Union's complaint, the claimant was reassigned back to his original position. Indeed, the claimant also took the same position in the Industrial Court as reflected in para. [39] of the award:

> The Claimant went on to submit that the Claimant's transfer from Acting Manager Grade N03G05 to Acting Executive Grade N05AG07 was a reflection of the Union's letter at page 36-47 of CLB-1 wherein the Union has urged that the Claimant can be subjected to disciplinary action.

[59] However, the alleged Union's pressure was not accepted by the Industrial Court as the Industrial Court did not make any finding on the alleged Union's complaints. In para. [48] of the award, the Industrial Court was ascertaining the reason relied by KTMB when transferring the claimant from the Acting Executive position to that of a locomotive driver. On this issue, the Industrial Court made the following finding in para. [59] and it reads:

> [59] Therefore, the Court is of the considered opinion that *since the Claimant's performance was never disputed or raised as an issue during the `Acting' attachment period and the Claimant free from disciplinary actions, he was perfectly entitled to claim constructive dismissal* when the Company issued the Claimant a transfer order from the post of Acting Executive back to his old position as a Locomotive Driver. (emphasis added)

[60] Thus, the Industrial Court had rejected the claimant's assertion that the claimant was reassigned to his original position based on the alleged Union's pressure.

Industrial Court Awards On Acting Position

[61] Parties are on common ground that there is no precedent in the superior courts in Malaysia to answer the question as to whether an acting role can be regarded as a confirmed permanent position, thereby warranting a claim for constructive dismissal when an employer reassigns the employee back to their original position.

[62] Parties were requested to submit on two Industrial Court awards. However, learned counsel for the claimant did not file any submission on this as well as for the appeal itself. In any event, the two Industrial Courts awards, which made different findings, are based on the factual matrix of each case.

Baladevan's Case

[63] In Award No. 1222 of 2019 between *Baladevan a/l Nadarajan and PPG Performance Coatings (M) Sdn Bhd* ("the *Baladevan*'s case"), the Industrial Court dismissed the claimant claim for constructive dismissal.

[64] In the *Baladevan*'s case, the claimant was initially employed by PPG Coatings (M) Sdn Bhd (the company's parent company) as a Manufacturing Superintendent in the Operations Department starting on 13 May 2008. He was subsequently offered the position of Production Manager with the company through an employment contract dated 9 September 2012 and was based at the Shah Alam Plant. At that time, the claimant reported to the Plant Manager, Mr Kent Ong.

[65] In late 2014, the company decided to shut down the Shah Alam Plant and transferred Mr Kent Ong to Indonesia, leaving a vacancy for the Plant Manager position in the Shah Alam Plant. The claimant was re-designated as Acting Plant Manager through a letter dated 23 September 2014, to fill the vacancy and his monthly salary was increased from RM8,862 to RM9,700.

[66] As part of the company's Transfer and Consolidation Plan, the claimant was offered the role of Production Manager with PPG Coatings (M) Sdn Bhd, effective 1 July 2015, with no change in salary (RM9,700 per month). The claimant accepted the offer and signed an employment agreement dated 26 February 2015, and a transfer letter dated 26 February 2015.

[67] Two months later, the claimant sent a letter dated 27 April 2015, to the company expressing his view that the employment contract with PPG Coatings (M) Sdn Bhd was a demotion and requested a severance package from the company. The company rejected the claimant's request and clarified that his redesignation as Acting Plant Manager was temporary and not a demotion, as he had returned to his previous role as a Production Manager. The claimant then considered himself to have been constructively dismissed.

[68] The claimant's claim of constructive dismissal was dismissed by the Industrial Court as the court took the position that the "acting" role is meant to be temporary and not permanent, unless the person is made permanent later. Added to that, the claimant was aware that his appointment as Acting Plant Manager was only temporary, as indicated in the company's letter dated 23 September 2014, which stated explicitly that the claimant was temporarily redesignated as Acting Plant Manager until further notice.

[69] The Industrial Court also made a finding that the intention of the parties was clear, that the claimant's designation as Acting Plant Manager was only temporary. The court accepted that the claimant was temporarily occupying the position and had no claim to the Plant Manager position. The

company had the right to return the claimant to his previous position as the Production Manager before being designated as Acting Plant Manager. To suggest otherwise would undermine the law and render the term "acting" meaningless.

[70] The Industrial Court also held that the claimant's argument that the Plant Manager position was still available at the time to be irrelevant. The company had the authority to appoint a suitable candidate for the position, and the claimant had no right to demand appointment as the Plant Manager simply because he was previously the Acting Plant Manager.

[71] The ruling in the *Baladevan*'s case by the Industrial Court supports KTMB's position that the crucial issue is whether the acting positions offered to the claimant were temporary, which was clearly the case. Both parties were clearly aware and were not under any misapprehension that the acting executive positions were merely temporary. There was no promise made by KTMB that the executive posts will be permanent. The claimant did not claim that he had a legitimate expectation to be given the executive posts permanently either. Added to that, KTMB has the management rights and authority to return an employee to their previous position before they were assigned an acting role and any other interpretation would undermine the law and render the term "acting" meaningless.

Girish Kumar's Case

[72] The other case is Award No. 1371 of 2010 between *A Girish Kumar Gopalakrishnan and Kilang Kelapa Sawit Sri Lingga Sdn Bhd & Bell Management Sdn Bhd* ("the *Girish Kumar*'s case"). In this case, the company hired the claimant as an Assistant Engineer in 1999. In 2000, he was given the role of Acting Mill Manager by the parent company, along with a monthly acting allowance of RM400 and a company vehicle.

[73] The claimant asserts that prior to 29 June 2002, he received no complaints about his work performance. However, on that day, he received three memorandums from the company indicating that his performance was declining and raising other concerns. The claimant responded to the memos.

[74] Subsequently, the company informed the claimant, through a letter dated 27 July 2002, of a transfer to another mill as an Assistant Engineer, his original designation. The claimant argues that this transfer resulted in the loss of his duties, responsibilities, and income, and felt he was constructively dismissed because he believed his appointment as Acting Manager was not temporary.

[75] The claimant further argues that during the time he served as Acting Mill Manager (nearly two years), there were no complaints against him and the company even increased his allowance and salary and gave him a bonus. As a result, he had a reasonable expectation of being kept in that position.

[76] The Industrial Court upheld the claimant's claim for constructive dismissal for the following reasons:

(i) the Industrial Court had assessed the evidence and determined that the company was pleased with the claimant's performance as Acting Mill Manager, as evidenced by the increase in his salary and allowance (a 9% raise in his salary and an additional allowance increase to RM1,000);

(ii) the Industrial Court rejected the company's justification for the claimant's temporary appointment as Acting Mill Manager due to a lack of a competency certificate. After examining the evidence, the court found that having a competency certificate was only a desirable qualification for the company, but not a requirement;

(iii) the Industrial Court acknowledged the company's right to transfer employees within the organisation for reasons of economy or efficiency, but emphasised that this right should not be exercised with any malicious intent or in violation of the employment contract;

(iv) the Industrial Court also noted that when the claimant was transferred for the first time, the company provided a reason for the transfer, but when he was transferred back to his previous position as Assistant Engineer, no reason was given. The court also found no evidence to suggest that the company no longer needed an Acting Mill Manager since they had found a suitable replacement; and

(v) the Industrial Court recognised that the company was satisfied with the claimant's performance until he received three memorandums on the same day. The court also acknowledged that the company did not dispute the claimant's assertion that he transformed a struggling mill into a profitable one and that his allowance as Acting Mill Manager increased from RM400 to RM600, and later to RM1,000 within two years.

[77] Therefore, the Industrial Court agreed that the claimant had a legitimate expectation that his appointment as Acting Mill Manager was a promotion and that he would continue to be retained in that position.

[78] The Industrial Court in the *Girish Kumar*'s case acknowledged that a company has the right to transfer an employee within the organisation for reasons of economy or convenience. However, the court emphasised that this right should not be exercised with any malicious intent and should not violate the terms of the employment contract.

[79] In the *Girish Kumar*'s case, there was evidence that the company was satisfied with the claimant's performance, as he had turned around a failing mill into a profitable one and was even given a bonus and pay increase. However, he was suddenly issued with three memorandums on the same day. In contrast, there is no such evidence of sudden or extreme change in treatment in the present appeal.

[80] In the present appeal, the claimant claimed to have been demoted twice, with the only basis for this being the letters written by the Railwaymen's Union of Malaya to KTMB. The claimant argued that KTMB was influenced by the union's pressure.

[81] However, we are of the considered opinion and we agree with KTMB that there is simply no proof that the company was influenced by any recommendation made by the Union. In fact, the Industrial Court did not make any finding on the Union's pressure either.

[82] Added to that, when he was moved from Acting Industrial Relations Executive (Grade N03G05) to Acting Executive, Rules and Regulations (Grade N05AG07) with effect from 30 July 2015, the claimant had complained about the alleged Union's pressure. He sought an explanation from KTMB, and KTMB's replied through its letter dated 25 August 2015, *inter alia*, that the acting position offered was temporary and in fact, when the acting period ended, the claimant was supposed to return to his original position as a locomotive driver. This explanation was accepted by the claimant and he proceeded to the Acting Executive, Rules and Regulations (Job Grade N05AG07).

[83] In any event, we find that it was within KTMB's right to do so, as the claimant's previous position before being transferred back was merely an acting position. As he was no longer required in the post of an Executive, Rules and Regulations, it is the management prerogative to reassign him back to his original post.

[84] As an acting Executive, Rules and Regulations, the claimant was only entitled to an acting allowance of RM518 as provided in the collective agreement, unlike Girish Kumar who received an increase in pay and a bonus. The provision of an acting allowance was a common practice for all employees in KTMB and was specifically outlined in the collective agreements between the company and the union.

[85] KTMB did not give the claimant any valid reason to expect his role as an acting Executive, Rules and Regulations, to be permanent, and the claimant did not claim or establish any reasonable expectation for it. The *mala fide* aspect that the Industrial Court discovered in the *Girish Kumar* case, where the claimant was performing well but suddenly received three memorandums in a single day, is not present in the current case. The complaint on the alleged Union's influence was before the Industrial Court, but having considered the facts of the case, the Industrial Court did not make any finding on the alleged union's influence.

[86] Therefore, for the aforesaid reasons, we are of the considered opinion that taking away an acting position can be considered a demotion if it was not *bona fide* and results in a significant decrease in the employee's

responsibilities, pay or status. If this demotion is found to be a significant breach of the employment contract, it could be considered a constructive dismissal.

[87] However, if the change in position was only temporary, properly communicated to the employee, and with the understanding that the employee would return to their original position, it may not be considered a constructive dismissal. It is therefore pertinent to examine the factual matrix of each case in order to determine if it constitutes a constructive dismissal.

[88] We reiterate that in the factual matrix of this appeal, the two reassignments were not tainted with *mala fide*, and the claimant was adequately informed that the acting reassignments were temporary and there was no express or implied promise made by KTMB that the two acting positions offered to the claimant would become permanent. Added to that, the claimant never mentioned having any expectation of being offered a permanent position in the executive positions in any of his correspondence with KTMB or in his testimony in court. In the circumstances of this case, there is no breach of a fundamental term of the claimant's contract of employment that would constitute a constructive dismissal.

Rights Of A Probationer

[89] The learned judge also made a finding that the claimant, who was in an acting role, has the same rights as a permanent or confirmed employee as a probationer. The learned judge held as follows:

> [23] As to the issue that Mr. Mohan was only holding an acting post, I am of the view that an employee who is on acting post is similar to a probationer who enjoys the rights as a permanent or confirmed employee. He should not be terminated without just cause or excuse.
>
> [24] Reference is made to the Court of Appeal case of *Khaliah Abbas v. Pesaka Capital Corp Sdn Bhd.* [1997] 3 CLJ 836, which states as follows:
>
> > Although the word probation or probationary was not found in the definition of workman in s. 2 of the Act, the word apprentice was mentioned in the section and an apprentice would normally be a probationer, Therefore, employees on probation would come within the purview of s. 20(1) of the Act and the Industrial Court would have jurisdiction to hear and determine whether the dismissal of the appellant was with just cause or excuse. Consequently, an employee on probation would enjoy the same rights as a permanent or confirmed employee and, therefore, his or her service could not be terminated without just cause or excuse. By the same way, the requirement of *bona fides* was essential in a dismissal of an employee on probation. However, if the dismissal or termination was found to be a colourable exercise of the power to dismiss or was a result of discrimination or unfair labour practice, the Industrial Court would have the jurisdiction to interfere and to set aside such dismissal.

A Hence, it is clear that this court is seized with jurisdiction to consider whether the claimant was dismissed with a just cause or excuse regardless that he was still under probation. An employee regardless that he is a probationer is accorded similar protection enjoyed by a confirmed employee.

B **[90]** However, we are of the considered opinion and we agree with learned counsel for KTMB that the learned judge's conclusion on this is not tenable in law and in the factual matrix of this appeal. In the first place, this issue was not raised either in the Industrial Court nor was it argued by parties before the learned judge. Learned counsel for KTMB submitted that this issue was only raised by the learned judge in his judgment.

C

[91] Added to that, the issue of probation is a non-issue as the claimant has always been a permanent employee of KTMB, pursuant to the employment contract dated 14 September 1994.

D **[92]** Further, the cases referred to by the learned judge, *Khaliah Abbas v. Pesaka Capital Corporation Sdn Bhd* [1997] 3 CLJ 827 and *Bennett Subash Peter v. Bon Ton Sdn Bhd (Bon Ton Resort Langkawi)* [2019] 4 CLJ 150; [2018] MLJU 1041, do not support the decision that a permanent employee holding an acting post is similar to a probationer.

E **[93]** In any event, the reason for granting probationers the rights of confirmed employees in terms of termination of their services is because they have a legitimate expectation of being confirmed in their position as long as they are fit and proper for the role. This crucial element of legitimate expectation is not present in this case, as neither the Industrial Court nor the learned judge gave any due consideration to the issue of whether the claimant F had a legitimate expectation of being offered a permanent executive position in the first place. Added to that, the claimant himself never mentioned having any expectation of being offered a permanent position in the executive positions in any of his correspondence with KTMB or in his testimony in court.

G

Conclusion

[94] Based on the aforesaid reasons, we are of the considered opinion that the claimant has failed to prove, on a balance of probabilities, that KTMB had breached a fundamental term of the employment contract that evinced H an intention not to be bound by the contract, leading to his constructive dismissal.

[95] Both the Industrial Court and the High Court had committed an error in law and in facts by concluding that KTMB had unilaterally altered the employment terms when they transferred the claimant from an executive to I a non-executive position without valid reasons. The two executive positions

that were held by the claimant were only temporary in nature with no promise nor expectation of permanency. Once the claimant was no longer required in the acting executive positions, he would be reassigned back to his original position.

[96] In the factual matrix of this case, we find merits in the appeal and we set aside the decision of the learned judge. We allow KTMB's application for judicial review and quash the award of the Industrial Court with no order as to costs. Consequently we dismiss the claimant's appeal on the quantum of compensation.